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SEP 17 1990

(3)
NO. 90-214

Supreme Court, U.S.
FILED
SEP 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES A. FAHRIG and SHIRLEY A. FAHRIG,
Petitioners,

vs.

THE HONORABLE RICHARD S. DODGE, JUDGE,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF OF PETITIONERS

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10 PP

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
REPLY BRIEF (Four Parts)	
PART I.....	1
PART II.....	1
PART III.....	2
PART IV.....	3
CONCLUSION.....	6

TABLE OF AUTHORITIES

	Page
CASES	
<i>Dehart v Aetna Life Insurance Co.</i> , 69 Ohio St2d 189, 23 Ohio Ops3d 210, 431 NE2d 644 (1982).....	4
<i>Hawkins v Marion Correctional Institute</i> , 28 Ohio St3d 4, 501 NE2d 1195 (1986).....	5
<i>Lewis v Connor</i> , 21 Ohio St3d 1.....	5
<i>Pembauer v City of Cincinnati</i> , 475 US 469, 485, 486.....	3
<i>Perry v Perry</i> , 7 Ohio App3d 318, 455 NE2d 689.....	4
 OHIO CONSTITUTION	
O Const, Article IV, Section (B)(2)(a)(i).....	2

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I. In reply to Respondent's Statement of the Case, Petitioners state that they sought a Writ of Mandamus to compel the trial judge to 'settle' and 'approve' proposed narrative statements of proceedings, and not to 'settle' and 'approve' certain motions as stated by the Respondent on pages 1 and 2.

II. On page 2 Respondent states that "The Ohio Supreme Court dismissed the proceeding for failure to file in a timely manner" and on page 3 of Respondent's Reason For Denying The Writ, Respondent further states that "One

inherent condition of any appeal is that it be filed in a timely manner, this is a prerequisite to the perfection of any appeal"

Petitioners' appeal was perfected in a timely manner on January 23, 1989 by the filing of their notice of appeal and payment of the filing fee pursuant to the Ohio Constitution, Art. IV, Sec. 2(B)(2)(a)(i) which reads as follows:

O Const IV Sec. 2 Supreme Court

(B)(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

Respondent cites three cases wherein an Ohio statute requires that a copy of the tax commissioner's report be appended to the notice of appeal in order for the appeal to be perfected.

There is no statute involved in Petitioners' case and the only requirement is the filing of a copy of the notice of appeal, previously filed in the Court of Appeals, together with the payment of the filing fee in order to have the appeal perfected. Petitioners' appeal was perfected on January 23, 1989.

III. Another reason which Respondent presents for denying Petitioners' Writ states on page 3 that:

"the State Supreme Court dismissed Petitioners' case on the ground that the brief was not timely filed" and that "Petitioners were given until September 26, 1989 to file their Brief" and further, that "Said Brief was not filed until October 18, 1989."

Petitioners' reply by stating that on September 25, 1989 they timely filed a Motion entitled "Relators' Motion

To Extend Time With Attached Affidavit", requesting a three week extension to replace the previous extension of three weeks which time of three weeks was lost due to Petitioner Shirley A. Fahrig having to perform jury duty during the same period of time, namely September 5 through September 26. A copy of the jury summons was filed in the case and the court was therefore apprised of same.

Petitioners believed this request was reasonable and presented to the Court an unusual circumstance for granting a replacement extension of time so that Petitioners could perform their legal research at out of town law libraries which they are required to do since they are not permitted to use the local Montgomery County Law Library.

IV. Respondent on page 3 states that the Supreme Court dismissal "should not be reviewed since it does not merit scrutiny from this Court.." and that "this Court defers to the lower courts in the interpretation and application of state law." and cited *Butner v United States*, *Pembauer v City of Cincinnati*, *United States v S. A. Empresa De Viacao Aerea Rio Grandense*, and *Pacific Gas & Electric Co. v State Energy Resources Conservation and Development Commission*.

Butner, Etc., United States, Etc., and Pacific Gas, Etc., supra, are federal court cases and have no application to this case since there is no interpretation and application of state statutes in Petitioners' case.

In *Pembauer v City of Cincinnati*, 475 US 469, 484, 485 (1986) this Court granted a Writ of Certiorari and found that Pembauer's Fourth and Fourteenth Amendment rights (Title 42, Section 1983) were indeed violated due to the county prosecutor making "a considered decision based on his understanding of the law."

Like Pembauer, these Petitioners are contending that their federal and state constitutional rights have been violated by the application of the rules in Petitioners' lawsuit - which application of the rules is applied differently as to other litigants.

The prevailing policy in Ohio is to hear cases on the merits. The Ohio Supreme Court, in *DeHart v Aetna Life Ins. Co.*, 69 Ohio St2d 189, 431 NE2d 644, stated as follows in its syllabus by the Court::

"A court of appeals abuses its discretion when, after dismissing a case, *sua sponte*, for a minor, technical, correctable, inadvertent violation of a local rule, it refuses to reinstate the case when: (1) the mistake was made in good faith and not as part of a continuing course of conduct for the purpose of delay, (2) neither the opposing party nor the court is prejudiced by the error, (3) *dismissal is a sanction that is disproportionate to the nature of the mistake*, (4) the client will be unfairly punished for the fault of his counsel, and (5) *dismissal frustrates the prevailing policy of deciding cases on the merits.*" (Emphasis added)

And, in *DeHart* at 193, the Ohio Supreme Court said:

"Only a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds."

And also in *DeHart* at 192, the Ohio Supreme Court said:

"Judicial discretion must be carefully - and cautiously - exercised before this court will uphold an outright dismissal of a case on purely procedural grounds."

In *Perry v Perry* , 7 Ohio App3d 318, 455 NE2d 689, wherein the appellant tendered his brief with a motion

instanter 28 days late, the Court of Appeals for the Tenth Judicial District held in its Syllabus that:

"Where there is no apparent prejudice to appellee resulting from the undue delay of appellant's failure to file a timely brief, *the interest of determining appeals upon their merits justifies the granting of appellant's motion to file his brief instanter out of rule*, so long as all costs of the action to date are assessed against him, regardless of the outcome of the appeal on the merits." (Emphasis added)

The Ohio Supreme Court, in *Hawkins v Marion Correctional Institute*, 28 Ohio St3d 4, 501 NE2d 1195 (1986) held that dismissing an appeal as a sanction for failing to file a brief is not automatic and is within court's discretion. *Hawkins*, *supra*, is replete with citations from the Ohio State Supreme Court decisions as to why it is the policy in Ohio to hear cases on the merits and emphatically states that judicial discretion must be carefully and cautiously exercised before the Supreme Court of Ohio will uphold the outright dismissal of a case on purely procedural grounds.

In yet another effort to apprise the bench and bar of the State of Ohio to the Supreme Court of Ohio's philosophy in reviewing procedural dismissals, the Supreme Court of Ohio rendered a unanimous opinion in *Lewis v Connor*, 21 Ohio St3d 1 (1986), wherein Justice Wright reiterated the Court's philosophy:

"I briefly concur to draw the attention of the bench and the bar to the recent trend of cases emanating from this court which make it clear that when appropriate this court will construe the Ohio Rules of Civil Procedure and other rules to insure that controversies are decided on their merits rather than on overly technical applications of the rules which would lead to a dismissal."

The Supreme Court, in dismissing Petitioners' appeal, is clearly guilty of a gross abuse of judicial discretion. Petitioner Shirley A. Fahrig performed jury duty as required by law and these Petitioners should not be penalized by doing so.

CONCLUSION

The Ohio Supreme Court should have recognized the eighteen (18) copies of Petitioners' sixty (60) page Brief filed on October 18, 1989 which contained nine (9) Propositions of Law and citations of forty (40) cases and eight (8) additional citations of law. The Ohio Supreme Court should have recognized the loss of three (3) weeks of Brief research and preparation time due to the jury duty of three weeks. It is obvious that Petitioners performed considerable legal research for their cause. They were sincere in the presentation of their appeal on the merits to the Ohio Supreme Court. Petitioners' appeal should not have been dismissed on "purely procedural grounds". Furthermore, Petitioners' appeal could have been heard on the 'RECORD' as filed.

It is evident that Petitioners have not been afforded the same rights as afforded the litigants in the cases cited supra. The policy as expounded by the Supreme Court of Ohio of having cases heard on the merits and of not having cases dismissed on "purely procedural grounds" has not been accorded to these Petitioners to the deprivation of their state and federal constitutional rights.

Respectfully submitted,

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